Supreme Court, U.S.
FILED
JAN 19 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-938

WINNEBAGO TRIBE OF NEBRASKA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NATIVE AMERICAN RIGHTS FUND

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Winnebago Tribe of Nebraska respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on October 22, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals in consolidated cases No. 71-1122 and 71-1345 is not yet reported. There are three opinions of the two District Courts. The first is reported at 319 F.Supp. 428 (D. Neb. 1970) and the others, dated February 3, 1971 and May 25, 1971, are unreported. All opinions are included in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 22, 1971, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a District Court ruling granting a contested motion for summary judgment, allowing the Army Corps of Engineers to take Indian land guaranteed by Treaty, a "final decision" within the meaning of 28 U.S.C. §1291 where

(a) The authority of the condemnor is challenged;

(b) Title and possession have passed to the Government; and

(c) Appeal after determination of just compensation will, as a practical matter, come too late to vindicate the unique and substantial rights of the petitioner?

2. May the Court of Appeals review interlocutory orders of a District Court under 28 U.S.C. §1292(a), when in a condemnation case an Indian tribe, after the timely filing of its answer, requests injunctive relief to prevent irreparable injury to its lands guaranteed by treaty and the two requests are "stricken" and "overruled" on the ground that Rule 71 A(e), Federal Rules of Civil Procedure, does not permit the filing of a request for injunctive relief?

3. Under all of the facts of this case, did the Court of Appeals err in failing to take jurisdiction on the ground that the District Court had abused its discretion in failing to grant a motion for certification under 28 U.S.C. §1292(b)?

TREATY AND STATUTES INVOLVED

14 Stat. 671 (Winnebago Treaty of 1865)
28 U.S.C. §1291
28 U.S.C. §1292(a)
28 U.S.C. §1292(b)
Rule 71A(e), Federal Rules of Civil Procedure

The pertinent text of the treaty and the entirety of the remaining provisions are set forth in the appendix.

STATEMENT OF THE CASE

The Treaty of 1865 between the United States of America and Petitioner, the Winnebago Tribe of Nebraska, guaranteed the land in this case to the Winnebagos "forever."

The United States Army Corps of Engineers is attempting to condemn the land, along with the adjacent lands, in collaboration with the states of Iowa and Nebraska. The purpose of the condemnation proceeding is to acquire land to construct a recreation facility along the Missouri River, known as the Oxbow Lake, Snyder-Winnebago Complex.

The Winnebagos, defendants in three separate suits which have been consolidated on appeal, filed answers to the Government complaints. The Tribe's defense in each case was that Congress failed to manifest the intent necessary to abrogate the Treaty of 1865 and that, consequently, the Corps was not authorized to condemn the Tribe's land. The District Court had already awarded possession of the land to the Government, construction contracts were being let, and the numerous parties and title disputes promised protracted litigation on the issues of valuation and title; as a result, the Winnebago Tribe requested the Nebraska court for a preliminary injunction to prevent government employees from coming on to the subject property and moved for summary judgment. The United States moved for summary judgment on its right to take.

The Nebraska District Court struck the Winnebago motions for injunctive relief and for summary judgment as not allowable under Rule 71 A(e), Federal Rules of Civil Procedure. The court also granted summary judgment in favor of the United States. See, Appendix F.

The Tribe then moved in the Nebraska District Court for a certification under 28 U.S.C. 1292(b); in the alternative, the Tribe renewed its request for injunctive relief. On February 3, 1971, the District Court refused to certify and "overruled" the requested injunction. See, Appendix G.

In the Iowa actions, the District Court stated that it "agreed" with the result in the Nebraska case. On May 25, 1971, it ordered Petitioner's counterclaim and amended counterclaim stricken and granted the Government's motion for summary judgment. See, Appendix H.

The Tribe timely appealed all rulings to the Court of Appeals for the Eighth Circuit.

The Court of Appeals held that it did not have jurisdiction in regard to any of the three contested rulings below, i.e., the granting of the motion for summary judgment, the "striking" or "overruling" of the request for preliminary injunction, and the refusal to certify. The Court of Appeals concluded that under the standard in *Catlin v. United States*, 324 U.S. 229 (1945), "it is clear that no final judgment has been entered in this case," that it had "no jurisdiction to review the trial court's denial of the 1292(b) certificate," and that "no statutory or rule basis exists which confers jurisdiction upon this Court to entertain this appeal." See, Appendix E.

REASONS FOR ALLOWING THE WRIT

INTRODUCTION

The opinion below deals with all three bases for appellate jurisdiction of the Courts of Appeals, 28 U.S.C. §1291, 28

U.S.C. §1292(a), and 28 U.S.C. §1292(b). The Court below engrafted narrow and inflexible restrictions on each of the three statutes, with the result that jurisdiction was not accepted in an important case which was ripe for appellate review. By granting certiorari in this case, this Court will have the opportunity to clarify a broad range of significant questions under each of the statutes conferring appellate jurisdiction on the United States Courts of Appeals.

I. THIS CASE SQUARELY PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONDEMNATION PROCEDURE WHICH HAS BEEN EXPRESSLY RESERVED BY A DECISION OF THIS COURT.

The Court of Appeals correctly cited *Catlin v. United States*, 324 U.S. 229 (1945), for the general principle that "ordinarily" review in condemnation cases may be had only upon the final judgment, not solely upon a ruling on the right to take the property. The lower court, however, failed even to discuss the important question left reserved by this Court in *Catlin:*

> "We have not discussed other issues presented or suggested in the briefs or argument, since that has not been necessary to the disposition of this cause. These include the question whether, when possession has been taken and damage has been done to the premises in the course of proceedings not authorized, the remedy by appeal is adequate. That issue has not been made in this case. . . . *It will be time enough to consider the question concerning adequacy of the appeal or possible existence of other remedy affecting such a case when it arises.*" (Emphasis supplied.) 324 U.S. at 243-44.

The reserved question in *Catlin* arises here; this Court should grant certiorari to clarify the unresolved issue.*

This case directly involves the adequacy of the appeal from the final judgment. In the case at bar, "the tribal council has determined that the proposed project is not in the best interests of the Tribe" because the project was not consistent with the Tribe's own development plan. A representative of the Iowa Recreation Commission has stated that "construction was commencing immediately"; at least one contract has already been awarded and other contracts are in the process of being advertised. In its opening brief to the Court of Appeals, the Tribe emphasized that the land will be "permanently despoiled" before the appellate process is completed. The Government has refused to stipulate to a stay of the construction process. In spite of the obvious imminence of construction, the lower court never went beyond the "ordinary" rule set forth in *Catlin*.

The mechanical application of the finality rule by the court below is inconsistent with this Court's appreciation of the "faint and faltering" line which divides judgments "deemed 'final' from those found not to be so." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948). This Court has frequently recognized that, despite the general policy against "piecemeal review", there are situations in which fairness demands that the requirement of "finality be given a *practical* rather than a technical construction." (emphasis supplied). See, e.g., *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (jurisdiction held proper under section 1291 after District Court struck important part, but not all, of plaintiff's complaint for wrongful death); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (jurisdiction held proper under

*This Court, of course, has granted certiorari for the purpose of resolving reserved questions. See, e.g. *Federal Trade Commission v. Travelers Health Assn.*, 362 U.S. 293, 297 (1960).

section 1291 after District Court ruled, in shareholder's derivative suit, that plaintiff not required to post security). See also, e.g., *Forgay v. Conrad*, 6 How 201 (1848); *Brown Shoe Co. v. United States*, 370 U.S. 294, 304-11 (1962); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (alternative holding).* See also Judge Kaufman's comprehensive discussion in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. den.* 386 U.S. 1035.

Another crucial factor distinguishes this case from many condemnation cases and weighs on the side of permitting early review. We emphasize the distinction between condemnation cases where title and possession do not vest in the condemnor until after the determination of just compensation, and those cases where the Government has already taken title and possession, as in this case. The probability of irreparable damage to the condemnee in the latter situation is, of course, far greater.

Here, then, the delay inherent in an appeal from the facts of this complicated case will result in the loss of tribal land. This Court,** the President,*** and Congress**** have

*For example, this Court has considered orders decreeing immediate transfer of possession of physical property "final" for purposes of review, even though an accounting for profits is to follow. *Forgay v. Conrad, supra; Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362, 370-73 (1914); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). These cases are consistent in principle with authority holding that the question of the right to take and the issue of just compensation can be separated. See, *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U.S. 287, 290 (1891); *Puerto Rico Ry. Light and Power Co. v. United States*, 131 F.2d 491, 494 (1st Cir. 1942); *United States v. 243.22 Acres of Land* 129 F.2d 678, 680-83 (2d Cir. 1942), cert. den., 317 U.S. 698.

**See, e.g., *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345-46, 356-57 (1941); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 138-42 (dissenting opinion).

***See, e.g., President Nixon, Message to Congress, July 8, 1970 (one of prime injustices to Indians has been deprivation of "ancestral land"). C.f., President Jefferson, 8 Ford, *Writings of Thomas Jefferson* 241-49.

****See, e.g., Cong. Record, January 26, 1881, remarks of Senator Teller; Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 Ariz. L.Rev. 559, 563-64 (1968) (discussion of legislative intent concerning Dawes Act, 25 U.S.C. 331-57).

long recognized the deep, unique, and spiritual significance which Indian people attach to tribal land; the point need not be further emphasized here. It is in part this ultimate significance of land to the Indian people that takes this case out of the normal rationale for treating condemnation orders as nonappealable until the award of just compensation. See, e.g., *Republic Natural Gas Co. v. State of Oklahoma,* 334 U.S. 62, 71 (1948):

> "In an eminent domain case . . . [a]n adequate award . . . might well satisfy the losing party to acquiesce in the disposition of the earlier issue."

Words such as these, though perhaps applicable in many condemnation cases, simply do not ring true here.

We think that the above authorities provide the stuff to fill the void left in *Catlin*. Petitioner thus urges that this Court answer the reserved question in *Catlin* by treating as "final decisions," within the meaning of section 1291, that narrow, but monumentally important, class of rulings in condemnation cases where (1) authority to take is challenged, (2) title and possession have passed, and (3) the normal appeals process will, as a practical matter, come too late to vindicate the unique and substantial property rights of the property-owner.

II. THE DECISION OF THE COURT OF APPEALS INTERPRETING 28 U.S.C. §1292(a) CONFLICTS WITH A DECISION OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner urges that the Court of Appeals had jurisdiction under 28 U.S.C. §1292(a), which provides in relevant part as follows:

> "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the dis-

trict courts of the United States . . . refusing . . . injunctions. . . ."

After filing its Answer, the Tribe moved for a preliminary injunction to restrain Government employees from entry upon the subject property. The District Court ordered this motion "stricken" as not allowable under Rule 71A(e), Federal Rules of Civil Procedure. A34*. When the motion was renewed, the court "overruled" the motion. A44.

The Court of Appeals rejected the Tribe's argument that the "striking" or "overruling" of the motion for injunction should be treated as an order "refusing" an injunction within 28 U.S.C. §1292(a). The lower court held that the order was a ruling on a pleading and thus "clearly interlocutory" and "not appealable." A28.

General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932), arose under former Section 129 of the Judicial Code, which is virtually identical to section 1292(a).** The defendants set up a counterclaim which prayed for an injunction against infringement of patents. The plaintiffs moved to dismiss the counterclaim for want of jurisdiction and the District Court dismissed the counterclaim. The Court of Appeals held that it had jurisdiction on appeal. This Court affirmed, reasoning that:

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*The court purported to rely on *dictum* in *Maun v. United States*, 347 F.2d 970, 971 (9th Cir. 1965), but in *Maun*, unlike the instant case, the defendant failed to file a timely answer as required by Rule 71A(e). *Rands v. United States*, 367 F.2d 186, 188-89 (9th Cir. 1966), noted that the intent of Rule 71A(e) seemed to be to "cut off pleadings preliminary to the answer, not subsequent to it." *Rands* was reversed on wholly separate grounds. 389 U.S. 121.

The ruling of the District Court below renders federal courts powerless in condemnation cases to grant relief such as preliminary injunctions, summary judgment, or provisional remedies where such relief is necessary and appropriate. Such a holding has serious, negative ramifications in cases where environmental questions are involved, as well as in cases such as this, where unique federal property rights are asserted. Such fears were realized below, where the District Court went so far as to hold that Rule 71A(e) prohibited Petitioner's motion for summary judgment (A34), although the propriety of that ruling is not directly before this Court. We think it inconceivable that Rule 71A(e) was intended to be construed in such a tortured manner.

**Section 129 permitted review "where . . . an injunction is . . . refused . . . by an interlocutory order or decree. . . ."

> "[The District Court] necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is reviewable under §129 is sustained by reason and supported by the weight of judicial opinion [citing authority.]" 287 U.S. at 433.*

The ruling below is inconsistent with *General Electric*. The "dismissal" of the counterclaim for an injunction in *General Electric* and the "striking" of the request for injunction at bar should be treated the same for the purpose of establishing jurisdiction under section 1292(a).

Courts of Appeals for other circuits have held that the striking of requests for injunctive relief to protect important federal rights will be considered the same as the refusal of that relief. See, *Spangler v. United States*, 415 F.2d 1242, 1247-48 (9th Cir. 1969), where the court emphasized the "public importance" of the issues. 415 F.2d at 1248. See also, *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 826 (2d Cir. 1963), cert. den., 376 U.S. 944; *Brunson v. Board of Trustees*, 311 F.2d 107, 108 (4th Cir. 1962), cert. den., 373 U.S. 933. In *Spangler, supra*, the court stated:

"As a practical matter the district court by strik-

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*Similarly, in *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 192 (1942), this Court ruled that the test is the "substantial effect of the order," not the "terminology."

ing the allegations, has denied the government's request for an injunction." 415 F.2d at 1247.*

Similarly, in the case at bar, the "striking" or "overruling" of the motion for preliminary injunction has exactly the same consequences to the Winnebago Tribe as would an order "refusing" the motion. This Court and several Courts of Appeals have held that the proper test is the effect of the ruling, not semantics. Whatever the terminology — "striking", "overruling", or "refusing" — the requested injunctive relief was not afforded. This is plainly a case involving important Federal questions. Under these circumstances, we think that summary reversal is appropriate.

III. THE COURT OF APPEALS SANCTIONED AN ABUSE OF DISCRETION BY THE DISTRICT COURT, IN DENYING PETITIONER'S REQUEST FOR CERTIFICATION UNDER 28 U.S.C. §1292(b), WHICH CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

After the District Court granted the Government's motion for summary judgment, the Petitioner promptly moved for a certification under 28 U.S.C. §1292(b).**

After finding that all other requisites of section 1292(b)

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*The court in *Spangler*, quoting from Judge Friendly, also ruled that an interlocutory appeal *does* lie when the district court's refusal was " 'based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action.' " 415 F.2d at 1247. That situation was distinguished from the denial of the relief for discretionary administrative reasons, such as a discretionary refusal to consolidate the injunctive claim with other actions. The distinction applies here, because the District Court held that Rule 71A(e) flatly barred Petitioner's claim for injunction from being heard in the action.

**Section 1292(b) permits a district court judge to certify a normally non-appealable order if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate determination of the litigation." The section then accords the court of appeals discretion to permit an appeal from the order. As we have argued in Sections I and II, above, we believe that the order was in fact appealable. This argument is thus made only in the alternative.

had been met (A43), the District Court refused to certification on the ground that there was not a "substantial ground for difference of opinion as is required by 28 U.S.C. §1292(b)." The District Court conceded that Congress had not "specifically and expressly" authorized the taking in question, but found that Congress had "delegated" the authority in question to the Army Corps of Engineers.*

There is truly imposing authority contrary to the District Court's ruling — authority which creates, as a matter of law, "a substantial ground for difference of opinion." In addition to the authority set forth in the preceding footnote, the "Standing Rock" case, *U.S. v. 2005.32 Acres of Land*, 160 F.Supp. 193 (D.S.D. 1958), is fully in point — "Standing Rock" even involves the Flood Control Act of 1944, the asserted source of the Corps' "delegated" authority here. The Government has conceded "Standing Rock's" applicability to the case at bar. The reasoning in *Bennett County, South Dakota v. United States*, 394 F.2d 8 (8th Cir. 1968), is also controlling. The "first" *Seneca Nation* case, *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), cert. den. 360 U.S. 909, emphasized that Congress must be made aware of the possible use of Indian land if there is a treaty provision contrary to the proposed

*The decision of the District Court undercut basic and unquestioned federal policies, including (1) Indian Treaty Rights are to be interpreted in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people and all doubts are to be resolved in favor of the Indians, *Peoria Tribe of Indians v. United States*, 390 U.S. 468, 472 (1968); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); (2) The intention to abrogate or modify a federal treaty, the highest law of the land, will not be lightly implied to Congress, *Mynominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968); *United States v. Sante Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Pigeon River, etc., Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); (3) Tribes organized under the Indian Reorganization Act, 25 U.S.C. § 476, have the power "to prevent the . . . disposition . . . of tribal lands . . . without the consent of the tribe;" (4) The power of eminent domain is reposed in the legislative branch of government, *Hooe v. United States*, 218 U.S. 322, 335, 336 (1910); c.f. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); (5) The Army Corps of Engineers must comply with its own regulations concerning the acquisition of property, c.f., *Service v. Dulles*, 354 U.S. 363 (1957); *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970).

taking; there was ample congressional knowledge of the taking in *Seneca Nation*, but there was no such knowledge here. In addition, Judge Moore wrote a vigorous, well reasoned dissent in *Seneca Nation of Indians v. United States*, 338 F.2d 58 (2d Cir. 1964), an opinion acknowledged by the District Court below.* As the District Court also recognized, Justice Black dissented, joined by Chief Justice Warren and Justice Douglas, on a related point in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).** In short, the Army Corps of Engineers' right to condemn treaty land pursuant to supposedly "delegated" power is far more than a matter which merely involves "a substantial ground for difference of opinion"; it involves a question of the first order of importance, which should ultimately be resolved by this Court.

Granted, appellate review of a refusal to certify should be narrow in scope. Certainly it is a fair general principle that an overly broad scope of review would frustrate the generally admirable policy against interlocutory appeals. We think, however, that there is a far more significant principle involved here: no judge is above the law, and an arbitrary and extraordinary abuse "under the guise of judicial discretion" can be corrected by this Court. Cf., *Ex Parte United States*, 287 U.S. 241, 250 (1932). The Court of Appeals should have corrected the above abuse by taking jurisdic-

* This "second" *Seneca Nation* case is not nearly as extreme as the case at bar because Congress was advised several times during hearings that Seneca land would be used; thus the Senecas, unlike the Winnebagos, at least had the chance to present their case to Congress. See the "first" *Seneca Nation* case, 262 F.2d at 28. Furthermore, the "second" *Seneca Nation* case involved only the "exceedingly narrow issue" of whether the upgrading of a highway was an implied engineering detail in a project which had already been found to be authorized. 338 F.2d at 56. We doubt that Justice Marshall ever intended his "narrow" majority opinion in the "second" *Seneca Nation* to be extended as far as it has been by the District Court here.

** The majority opinion in *Tuscarora* is not at all inconsistent with our position. In *Tuscarora*, "reservations" were actually mentioned in the Federal Power Act, and the question was only whether the Tuscarora land was a protected "reservation" within the meaning of the Act.

tion under the All Writs Act, 28 U.S.C. §1651, either on its own motion or at Petitioner's request in its reply brief. See, *Cord v. Smith*, 370 F.2d 418, 421-22 (9th Cir. 1966).

This Court should formulate, pursuant to its supervisory function, a rule which will guide the lower courts in the administration of the certification procedure under §1292(b). This Court should consider a rule which permits such review only in those cases where (1) pure questions of law are involved, (2) the abuse of discretion is extraordinary, and (3) appeal from a final judgment will not afford full relief. Such a principle, which would be an important administrative contribution, would require the Court of Appeals to rule on the merits in the instant case.

IV. THE PROCEDURAL RULINGS BELOW HAVE THE DIRECT, PRACTICAL EFFECT OF PROHIBITING EFFECTIVE APPELLATE REVIEW OF AN ORDER WHICH ANNULS A UNITED STATES TREATY PROVISION.

The Treaty of 1865 gave the land to the Winnebago Tribe "forever." The following rulings by the Court of Appeals have created a procedural strait-jacket which prohibits the Petitioner from seeking any redress in the appellate courts:

> The ruling on the motion for summary judgment cannot be reviewed.
>
> The refusal to rule on the motion for preliminary injunction cannot be reviewed.
>
> The refusal to certify the case for appeal cannot be reviewed.

If none of the above rulings is changed, the project in question will be substantially completed before the Tribe

can contest the Government's right to take. By then, the virgin character of the Tribe's ancestral land will be irreparably destroyed, as well as the meaning of the word "forever."

This Court should grant certiorari to review the exercise of "the grave power of annuling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965). See also, *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961), where certiorari was granted "because the cases involve important rights asserted in reliance upon federal treaty obligations." If there is to be an effective review of the "delegated" annulment by the Army Corps of Engineers, then it must be done now. If it is not done now, then the treaty provision will be submerged by the waters of the Snyder-Winnebago Complex.

CONCLUSION

The Government has failed to produce even one syllable of congressional intent to justify the abrogation of the treaty provision in question. Rather, the Government takes the position that such a solemn promise as "forever" can be swept away by the Army Corps of Engineers, supposedly the holder of "delegated" authority from Congress.

The District Court then fashioned three procedural rulings which completely stymied appellate review. Unhappily, the Court of Appeals approved these rulings. Each of the three procedural rulings raises significant issues which should be dealt with by this Court on certiorari. The cumulative effect of these three rulings, moreover, is to insure the repeal of an explicit treaty provision — truly a subject in the front line of matters with which this Court grapples on certiorari. If this Court acts now, a serious abuse can be corrected. If this Court does not act now, then the land in question will be lost to the Winnebagos—forever.

Accordingly, we respectfully submit that this Court should issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

January, 1972

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A. 14 STAT. 671 (WINNEBAGO TREATY OF 1865) [IN PERTINENT PART]

* * * *

ARTICLES OF TREATY made and concluded at Washington, D.C., between the United States of America, by their Commissioners, Wm. P. Dole, C. W. Thompson, and St. A. D. Balcombe, and the Winnebago Tribe of Indians, by their chiefs Little Hill, Little Decoria, Whirling Thunder, Young Prophet, Good Thunder, and White Breast, on the 8th day of March, 1865.

ARTICLE I. The Winnebago tribe of Indians hereby cede, sell, and convey to the United States all their right, title, and interest in and to their present reservation in the Territory of Dakota, at Usher's Landing, on the Missiouri river, the metes and bounds whereof being on file in the Indian Department.

ARTICLE II. In consideration of the foregoing cession, and the valuable improvements thereon, the United States agree to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract or parcel of land ceded to the United States by the Omaha tribe of Indians on the sixth day of March, A.D. 1865, situated in the Territory of Nebraska, and described as follows, viz: Commencing at a point on the Missouri river four miles due south from the north boundary line of said reservation; thence west ten miles; thence south four miles; thence west to the western boundary line of the reservation; thence north to the northern boundary line; thence east to the Mis-

souri river; and thence south along the river to the place of beginning.

* * * *

B. 28 U.S.C. §1291

Final Decisions of District Courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

C. 28 U.S.C. §1292

Interlocutory Decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the

parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof shall so order.

D. RULE 71A(e), FEDERAL RULES OF CIVIL PROCEDURE

Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously

appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

E. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, OCTOBER 22, 1971.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 71-1122:

United States of America, *Appellee*,

v.

687.30 Acres of Land, more or less, situate in Dakota and Thurston Counties, State of Nebraska, et al., *Appellants*.

Appeal from the United States District Court for the District of Nebraska.

No. 71-1345.

United States of America, *Appellee*,

v.

210.43 Acres of Land, more or less, situate in Woodbury County, Iowa, et al., *Appellants*.

United States of America, *Appellee*,

v.

1,710.18 Acres of Land, more or less, situate in Woodbury and Monona Counties, Iowa, et al., *Appellants*.

Appeals from the United States District Court for the Northern District of Iowa.

October 22, 1971.

Before Van Oosterhout, Heaney and Ross, Circuit Judges.

Per Curiam.

The appeals arise out of condemnation proceedings instituted by the United States to obtain land in Nebraska and Iowa for a recreation facility along the Missouri River known as the Oxbow Lakes, Snyder-Winnebago Complex. The Winnebago Tribe of Nebraska, a defendant in the condemnation proceedings, has appealed from two orders entered by Judge Robinson in the District Court of Nebraska in case No. 71-1122. The Tribe has also appealed from orders entered by Judge McManus in the District Court for the Northern District of Iowa in two consolidated cases. All of such cases have been here consolidated upon appeal.

The Tribe by answer in each of the cases has asserted it owned some of the land involved in each case; that such land was acquired by treaty on March 8, 1865, which treaty guaranteed the Tribe the land forever; that Congress in the enabling legislation relied upon by the Government failed to manifest the requisite intent to abrogate the treaty and that consequently no power to condemn the Tribe's land exists. The trial courts ruled adversely to the Tribe on each issue.

The threshold issue in each case is whether the orders appealed from are appealable orders. We hold that the orders are not appealable orders and dismiss the appeals for the reasons hereinafter stated.

No. 71-1122, The Nebraska Case

The appeal in No. 71-1122 is from Judge Robinson's orders of October 23, 1970 and February 3, 1971. The October 23 order (1) strikes the Tribe's first amended answer and cross petition, (2) strikes the Tribe's motion for preliminary injunction and for summary judgment, and (3) grants plaintiff summary judgment on the issue of the Government's right to condemn the Tribe's land for recreational

purposes. Judge Robinson's opinion, reported at 319 F.Supp. 128, states the pertinent facts, the issues and the basis of his decision.

The February 3, 1971, order (1) denies the Tribe's motion to make certification of the October 23 order for interlocutory appeal under 28 U.S.C.A. §1292(b), (2) denies the Tribe's request that proceedings be stayed pending appeal of the October 23 order, and (3) denies the Tribe's request that status quo be maintained until defendants are able to appeal on the merits. The basis of the February 3 order is set out in the trial court's unreported memorandum opinion filed February 3, 1971. Therein the court states that there is little if any question about the Government's right to condemn the land and that the likelihood of the Tribe sustaining irreparable injury by the continuation of the project is at best only slight, and that it is likely that the Indians will benefit from the project.

The law with respect to our jurisdiction to entertain appeals in condemnation cases is fully stated in *Catlin v. United States*, 324 U.S. 229. In *Catlin*, petitioner raised the issue that the taking was not authorized by law. The Court, pursuant to 46 Stat. 1421, 40 U.S.C. §258a enacted in 1931, entered judgment in favor of the Government on its declaration of taking as authorized by the statute. The Supreme Court held that the judgment entered under such statute granting the Government possession under the declaration of taking was not an appealable order. The Court states:

> "Their right to appeal rests upon §128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but exe-

> cute the judgment. *St. Louis, I.M. & S.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here." 324 U.S. 229, 233.

The Court holds:

> "Accordingly, in our opinion the right of the owner to challenge the validity of the taking, for nonconformity with the prescribed statutory purposes, was not destroyed by the 1931 act. . . . No new right of separate appeal was given. The preexisting right of appeal, including appeal on grounds relating to validity of the taking, remained in force to be exercised when and only when final judgment, disposing of the cause in its entirety, has been rendered." 324 U.S. 229, 243.

See *United States v. 3,788.16 Acres of Land*, 8 Cir., 439 F.2d 291.

Under the standards stated in Catlin, it is clear that no final judgment has been entered in this case and that no appeal lies from the orders appealed from. The court's determination that the Government has the right to possession under its declaration of taking and its deposit of the estimated value of the land for the purpose claimed does not dispose of the litigation. Serious title controversies and the issue of just compensation remain for adjudication.

Twenty-eight U.S.C.A. §1292(b) permits the trial court to certify an issue for determination on an interlocutory ap-

peal upon the basis of findings specified by the statute. If such certification is made by the trial court, the Court of Appeals in its discretion may permit an interlocutory appeal. The Tribe sought a §1292(b) certification which was denied by the trial court in the February 3 order. The Tribe urges that the trial court abused its discretion in denying the certification. We have no jurisdiction to review the trial court's denial of the §1292(b) certificate. There is a strong policy in the law against interlocutory appeals. Section 1292(b) by its unambiguous language makes certification by the trial court a condition precedent to our right to exercise our discretion on the question of whether an interlocutory appeal will be allowed.

The February 3 ruling denying a stay pending appeal is a natural consequence of the denial of the §1292(b) certificate. The statute provides that certification shall not stay proceedings unless the district court or a Court of Appeals so orders. The order is not appealable.

Judge Robinson's reported opinion reflects that his ruling striking the answer and counterclaim and the motion for injunction and summary judgment are rulings on pleadings under Rule 71A(e), Fed. R. Civ. P. Rulings on pleadings are clearly interlocutory and are not appealable. Of course all interlocutory rulings are subject to review upon appeal from final judgment. See *Catlin v. United States*, supra.

We hold that no statutory or rule basis exists which confers jurisdiction upon this court to entertain this appeal. The appeal is dismissed for want of jurisdiction.

No. 71-1345. The Iowa Cases.

The two consolidated Iowa cases involve an appeal from Judge McManus' order of May 24, 1971, which (1) strikes the Tribe's counterclaim and amended counterclaim, (2)

determines that the Government is entitled to summary judgment upon the issue of the right to condemn the Tribe's land for recreational purposes.

The project for which condemnation is sought in the Iowa cases is the same project involved in the Nebraska case. No request for §1292(b) certification is sought in the Iowa cases nor is any motion for temporary injunction involved. For the reasons stated in the portion of this opinion relating to the Nebraska case, we dismiss the Iowa appeal for want of appellate jurisdiction.

Appeals dismissed for want of jurisdiction.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

F. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OCTOBER 29, 1970

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

United States of America,

Plaintiff,

vs

687.30 Acres of Land, more or less, situate in Dakota and Thurston Counties, State of Nebraska, and Winnebago Tribe of Nebraska, et al.,

Defendants.

FILED:
Oct. 29, 1970
CIVIL 03498
MEMORANDUM

ROBINSON, Chief Judge.

THIS MATTER comes before the Court on defendant's motion for summary judgment and preliminary injunction (Filing #28), and plaintiff's motion to strike paragraphs 1 through 2, inclusive of the defendant's answer, or in the alternative, for an Order granting summary judgment in its favor against the defendant. (Filing #32).

Briefs have been submitted and oral arguments received. The case was taken under submission and the Court is now ready to render its decision.

The Department of Justice, acting at the request of the Secretary of the Army, commenced this proceeding to condemn 687.30 acres of land, more or less, situated in Dakota and Thurston Counties, Nebraska, for use in connection with the operation and maintenance of the Oxbow Recreation Lakes, Snyder-Winnebago Complex. Included in this

687.30 acres of land, more or less, was a portion of the Winnebago Reservation belonging to the Winnebago Tribe of Nebaska, defendant herein.

A Declaration of Taking was filed March 24, 1970, and estimated compensation simultaneously deposited in the Registry of this Court, vesting title and possession to the land in the United States of America.

On August 4, 1970, the defendant filed a motion for summary judgment and preliminary injunction, together with affidavits of officials of the Winnebago Indian Tribe. Defendant's main contentions are that by formal treaty of March 8, 1865 the United States agreed to hold certain land along the Missouri River in the State of Nebraska in trust for the Winnebago Indians "forever," and that while Congress does have the power to abrogate the Treaty it must specifically authorize such abrogation, and that that has not been done. Also the Tribe contends that the taking constitutes a deprival of property without due process of law under the Fifth Amendment and that the Army Corps of Engineers failed to follow its own mandatory regulations.

The government opposes defendant's (Winnebago Tribe) motion for summary judgment and preliminary injunction with a motion to strike. The government argues that the defendant Indian Tribe may not maintain its motion because its answer was not filed within twenty (20) days after the service of plaintiff's complaint as is required by Rule 71A(e) of the Federal Rules of Civil Procedure which read as follows:

> "(e) *Appearance or Answer.* If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all

> proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claims, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed."

In regard to the government's contention, it should be noted, that the Tribal Chairman of the Winnebago Tribe was served with the complaint and notice of this action on April 4, 1970. Assistance in obtaining representation was immediately requested from the United States Attorney whom Congress has charged with the following responsibility:

> "In all States and Territories where there are reservations on alloted [sic] Indians the United States Attorney shall represent them in all suits at law and equity."

The United States Attorney's office declined to assist because it was representing the Corps of Engineers, but the Tribe was apparently given an oral extension of time to locate private counsel.

On May 11, 1970, a formal stipulation and joint applica-

tion for extension of time to answer was presented to this Court by the Assistant United States Attorney and temporary counsel for the Tribe in which the duty of the United States Attorney is acknowledged, his conflict of interest recited and the need of the defendant for additional time to obtain permanent counsel asserted.

This Court, acting upon the stipulation and joint application, issued its Order granting an extension of time until June 15, 1970.

By June 15, 1970, the Winnebagos had submitted a proposed attorneys' contract to the government pursuant to 25 U.S.C. §81. The contract was with the Omaha firm of Abrahams, Kaslow and Cassman. However, the contract was not yet approved on that date and this Court entered another Order granting an additional extension of time for answer until July, 1970.

On July 15, 1970, the defendant, Winnebago Tribe, duly filed and served its answer.

On July 31, 1970, defendant filed what it labeled a first amended answer and cross-petition setting forth additional grounds of defense.

On August 14, 1970, defendant filed its motion for summary judgment and preliminary injunction with affidavits.

On September 4, 1970, oral arguments were heard on defendant's motion for summary judgment and preliminary injunction.

The government filed its motion to strike defendant's answer and alternative motion for summary judgment on September 21, 1970.

Defendant contends that on the basis of the foregoing its answer was timely filed.

This Court first of all finds, on its own motion, that defendant's so-called first amended answer and cross-petition, which is in effect a supplemental answer and counterclaim, should be stricken. Rule 71A(e) provides that all objections or defenses to the taking must be asserted in the answer, no other pleading or motion is allowed, and objections or defenses not stated in such answer are waived. The rule is mandatory in form and does not permit the filing of a supplemental pleading. *United States v. Avigation Easement Over 40 Acres of Land, More or Less, Anchorage, Territory of Alaska* 140 F.Supp. 289. (D.C. Alaska 1956); See also, the Advisory Committee's note to subdivision [e] of Rule 71A. Thus, even assuming arguendo that defendant's original answer was timely filed it could not file a supplemental answer, but must rely on the objections and defenses set out in the first. Rule 71A(e) is quite clear in this regard. The only instance in which a defendant may file an additional or supplemental answer, is where the government files an amended complaint pursuant to Rule 71A(f). That was not done here and defendant's supplemental answer, must therefore be stricken.

In like manner, this Court also finds that defendant's motion for summary judgment and preliminary injunction must be stricken. The Ninth Circuit Court of Appeals in *Maun v. United States*, 347 F.2d 970 (9th Cir. 1965), held that it was not error where the district court had ordered stricken defendant's motions to dismiss and for summary judgment. That court concluded:

> ". . . Under Rule 71A(e), Federal Rules of Civil Procedure, the only response which a defendant may make to a complaint in condemnation filed in a district court is an answer. . . ." 347 F.2d at 973.

This Court must now determine whether or not defendant's answer was timely filed, and whether or not it was proper for this Court to grant several extensions of time for the filing of such answer.

Whether or not a district court has discretion under Rule 71A(e), is an open question. The government in its brief refers to the case of *United States v. Rands*, 224 F.Supp. 305 (D.C. Ore. 1963), wherein it was said, as follows:

> "It is my opinion that Rule 71A(e) requiring landowners to present all defenses or objections to the taking within twenty days from the date of service of process, is absolute and the court, on that particular feature, has no jurisdiction to extend time in which to raise such defenses." 224 F.Supp. at 306.

The Ninth Circuit Court of Appeals reversed in *Rands v. United States*, 367 F.2d 186 (9th Cir. 1966), on the issue of just compensation, but left open the question as to whether or not a district court has discretion under Rule 71A(e) to extend time within which to answer.

The United States Supreme Court reversed the Ninth Circuit on the issue of just compensation and reinstated the judgment of the District Court in *United States v. Rands*, 389 U.S. 121 (1967). However, the question of a trial court's discretion to extend answer time under Rule 71A(e) was not discussed.

In *Atlantic Seaboard Corporation v. Van Starkenburg*, 318 F.2d 455 (4th Cir. 1963), the Fourth Circuit Court of Appeals, in an opinion written by Judge Haynsworth, found that a district court "had the discretionary authority to grant the defendants the right to file an answer", within a certain time, beyond the twenty day period set out in Rule 71A(e).

This Court agrees with Judge Haynsworth's conclusion that a district court does have discretion under Rule 71A(e) to grant an extension of answer time, and finds that this was a particularly proper case for such an extension of time. Here, to follow the government's line of argument would in effect allow it to profit by its own laches, which would be against any notion of equity and justice. The United States' Attorney in this case was placed in the uncomfortable position of representing both the plaintiff and defendant in a condemnation action. This Court feels he proceeded properly in this action by first granting an oral extension to the Indians, and then coming to this Court to have orders entered extending the answer time, until the Indians could find competent counsel. However, the United States Attorney cannot now assert that these answers were not timely or that this Court lacked discretion to extend the answer time. He is estopped.

This Court must now decide whether or not defendant's original answer should be stricken or in the alternative whether or not the government should be granted a summary judgment in its favor.

Plaintiff has moved that paragraphs 1 through 2, inclusive, of defendant's answer, should be stricken. Those paragraphs read as follows:

> "1. The Winnebago Tribe of Nebraska is a Federal corporation by virtue of a charter granted by the Secretary of the Interior on July 18, 1936 and is the sovereign owner of the territory embraced in the Winnebago Reservation in Nebraska, as the same is described by the Treaty of March 8, 1865 (14 Stat. 671) and all additions and accretions thereto.
>
> "2. This defendant holds title in fee simple to the several parcels of real estate situated in Thurston

County, Nebraska, and more particularly described in plaintiff's Complaint as Tract A, Parcel 1 and Tracts 113 and 114."

Rule 12(f) of the Federal Rules of Civil Procedure, provides that a court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." This Court is of the opinion that the challenged paragraphs of defendant's answer do not come within the purview of Rule 12(f) and, therefore, plaintiff's motion pursuant to that rule is without merit.

This Court must now decide whether or not the government is entitled to a summary judgment as a matter of law. The facts not being in dispute this is a proper case for disposition by summary judgment under Rule 56.

Eminent domain is an attribute of the sovereign power of the United States, and is limited only by the just compensation clause of the Fifth Amendment. *Hanson Co. v. United States*, 261 U.S. 581, 584 (1923); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 656-657 (1890). Defendants herein contend, however, that these Indian Tribal lands are not ordinary lands, but are lands held in trust by the United States for the Winnebago Indian Nation by virtue of a Treaty between the United States and the Winnebago's dated March 8, 1865, and ratified by the Congress in 1866. 14 Stat. 671; 2 Kapp. 874.

Defendants argue that although Indian Treaty land may be condemned pursuant to eminent domain power, it requires a special Act of Congress abrogating the Treaty insofar as it relates to the particular land in question, before such condemnation can be carried out. Such a conclusion would not necessarily place an additional limitation on the power of eminent domain but would only prescribe a certain mode of procedure when Indian lands are involved.

However, the case law seems to be contrary to defendant's contention.

In *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641 (1890), the United States Supreme Court held that an Indian Nation is not sovereign in the sense that the United States or a State is sovereign, but is a dependent political community, subject to the paramount authority of the United States. The Court further held that the United States may exercise the right of eminent domain in respect to lands in the Territories, in any of the States, for purposes necessary to the execution of the powers belonging to the General Government, such an exercise being essential to "the independent existence and perpetuity of the United States." The court said as follows:

> ". . . The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects or are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." 135 U.S. at 657.

In *Choate v. Trapp*, 224 U.S. 665 (1912), the United States Supreme Court stated:

> "There are many cases; . . . , recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public

laws which could be abrogated at the will of the United States."

It was said in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) as follows:

> "... [I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

In *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964), *cert. den.*, 380 U.S. 952, it was said by Judge (Now Mr. Justice) Marshal, as follows:

> "... Congress need not itself specifically and expressly authorize by 'special enactment' each particular taking of Indian land, but can choose to delegate some of its authority to administrative offices and agencies." 338 F.2d at 56-57.

The condemnation of Indian land in the present case is unquestionably a part of the multiple-purpose project for the improvement and use of the Missouri River between Sioux City, Iowa, and the mouth of the river. This project is a part of the comprehensive plan adopted by Congress for flood control, navigation, irrigation, power development, recreation, and the fullest possible development and utilization of the water resources within the Missouri river basin. See, Act of June 28, 1938, 52 Stat. 1215; Act of December 22, 1944, 58 Stat. 887; Act of March 2, 1945, 59 Stat. 10; Act of October 23, 1962, 76 Stat. 1173; Act of December 11, 1969, 83 Stat. 323.

The land involved in this action is land necessary for use with the Oxbow Recreation Lakes, Snyder-Winnebago Complex, which is being developed as part of the overall improvement project.

In addition, the government sets out in its brief several excerpts from House and Senate Reports and committee hearings which establish the fact that Congress was aware of the Snyder-Winnebago Complex plans.

The decision to condemn the lands in question was made by the Secretary of the Army and Congress delegated such condemnation authority to him. See Act of April 24, 1888, 25 Stat. 94. And since Congress is not itself required to specifically and expressly authorize by a special enactment each particular taking of Indian land, but can choose to delegate some of its authority to administrative agencies, *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 893 (2d Cir. 1958), *cert. den.*, 358 U.S. 841; *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964), *cert. den.* 380 U.S. 952. This Court should not interfere with a reasonable exercise of the delegated administrative discretion.

Defendant's so-called crosspetition (actually a counterclaim) is without merit, as is its argument that this taking constitutes a deprival of property without due process of law, under the Fifth Amendment.

Nothing in this opinion should be construed as foreclosing defendant's rights on the issue of just compensation.

Dated this 23th day of October, 1970.

G. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, FEB. 3, 1971

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

United States of America,

Plaintiff

vs.

687.30 Acres of Land, more or less, situate in Dakota and Thurston Counties, State of Nebraska, et al.,

Defendants

FILED:
Feb. 3, 1971
CIVIL 03498
MEMORANDUM
AND ORDER

ROBINSON, Chief Judge.

THIS MATTER comes before the Court upon motion of defendant, Winnebago Tribe of Nebraska (Filing #36) for an amendment of this Court's Order of October 23, 1970 (Filing #35).

The Order of October 23, 1970 granted plaintiff's motion for summary judgment and denied and ordered stricken defendant's motion for summary judgment and preliminary injunction. Defendant now asks this Court to make an express determination pursuant to 28 U.S.C. §1292(b) that the October 23rd Order involves controlling questions of law as to which there is substantial ground for difference of opinion. That an appeal may materially advance the ultimate termination in this litigation and, further, that the proceedings in this case as may affect the Winnebago Tribe in this Court should be stayed pending disposition of the appeal; or, in the alternative the Court should enter an

order preserving the *status quo* during the pendency of this proceeding until such time as the Court shall issue a final appealable order.

Section 1292(b) of Title 28 of the United States Code provides in pertinent part, as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Defendant contends that the authority of the Corps of Engineers to condemn land for the construction of the Oxbow Lakes, Snyder-Winnebago project is the fundamental issue upon which this entire suit is premised. The Court is in complete agreement with this contention. The Court, however, does not agree that there is a substantial ground for a difference of opinion on this point. As this Court stated in its previous Memorandum of October 23rd (Filing #34), at page 10:

> "The decision to condemn the lands in question was made by the Secretary of the Army and Congress delegated such condemnation authority to him. . . . And since Congress is not itself required to specifically and expressly authorize by special enactment each particular taking of land, but can choose to delegate some of its authority to administrative agencies, . . . this Court should not interfere with a reasonable exercise of the delegated administrative authority."

This Court is still of the opinion that the necessary authority to condemn the land in question was present, and that this is a point upon which there can be little if any difference of opinion.

Two of the authorities which defendant cites to show that there is a substantial ground for difference of opinion as to a controlling question of law are dissenting opinions. One a dissent by Justice Black in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 124 (1960); the other by Judge Moore in *Seneca Nation of Indians v. United States*, 338 F.2d 55, 57 (2d Cir. 1964). And while dissenting opinions are always worthy of note they are not the law, and in this Court's opinion they are not precedent for a showing of a substantial ground for difference of opinion as is required by 28 U.S.C. §1292(b).

The other two cases cited by defendant *United States v. 2005.32 Acres of Land*, 160 F.Supp. 193 (D.S.D. 1958) and *Maun v. United States*, 347 F.2d 970, 978 (9th Cir. 1965) avail defendant of nothing. In the first case the Government had not met its burden of showing the authority to condemn the Indian land. In the present case, however, this Court has clearly ruled that the Government has met its burden of showing its authority to condemn the land in question. In short, this Court is not in disagreement with the law of that case, it just happens that the facts of the two cases are substantially different. The second cited case does not go to the question of authority to condemn Indian land, which is the question with which we are concerned.

Defendant also contends that this Court's determination to strike rather than deny defendant's motion for a preliminary injunction is a crucial ruling for which there is substantial ground for difference of opinion. The Court does not agree, because it is clear under Rule 71A(e) of the Federal

Rules of Civil Procedure, that the only response which a defendant may make to a complaint in condemnation filed in a district court is an answer. When motions such as motions to dismiss or for summary judgment are filed prior to an answer, it is proper to order them stricken. See, *Maun v. United States*, 347 F.2d 970, 973 (9th Cir. 1965).

In addition the Government has made a showing that the likelihood of the Indians sustaining any irreparable harm by the continuation of the project is at best only slight. And it appears that it is likely that the Indians land will accrue benefits as a result of the project.

This is not a case where land or other rights are being taken without just compensation. The Indians will be fully and adequately paid for any land taken for this public project. Accordingly,

IT IS ORDERED that defendant, Winnebago Tribe's motion for modification of Order should be and is hereby overruled.

Dated this 3rd day of February, 1971.

BY THE COURT:

CHIEF JUDGE, UNITED STATES DISTRICT COURT

H. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION,

MAY 25, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

United States of America,
Plaintiff,
vs.
210.43 Acres of Land, m/o/l, situate in Woodbury County, Iowa, et al.,
Defendants,

FILED
May 25, 1971
CIVIL NO.
70-C-3013-W

ORDER

United States of America,
Plaintiff,
vs.
1,716.18 Acres of ! nd, m/o/l, situate in Woodbury and Monona Counties, Iowa, et al.,
Defendants.

CIVIL NO.
70-C-3015-W

This matter is before the court on plaintiff's mtion filed April 2, 1971 to strike the answer, cross-petition (counter-claim), and the amended answer and cross-petition of defendant The Winnebago Tribe of Nebraska, or in the alternative for summary judgment as to defendant Winnebago Tribe on the issue of the right and authority of the United States to condemn their land. Defendant Winnebago's resistance was filed May 17, 1971.

The Department of Justice, acting at the request of the Secretary of the Army, commenced these actions to condemn certain lands for use in the construction of a recrea-

tional facility along the Missouri River, known as the Oxbow Lakes, Snyder - Winnebago Complex. Included in this land is a portion of the Winnebago Reservation. It is defendant Winnebago's position that their land may not be condemned without the Congress of the United States evidencing the intent to abrogate the Treaty of March 8, 1865 which gave this reservation to The Winnebago Tribe of Nebraska. The Tribe also contends that the Army of Corps of Engineers has failed to follow its own mandatory procedures for acquiring property in which another governmental agency has an interest. The Tribe contends in its amended counterclaim that if the Treaty of March 8, 1865 is abrogated, and their land taken, that they are entitled to the restoration of all lands formerly held in the Territory of Dakota, at Usher's Landing, on the Missouri River, that was ceded by them to the United States under the Treaty.

There is presently pending in the U.S. District Court, District of Nebraska, Case No. 03498 which involves both defendant Winnebago Tribe and the same government project. In that case Chief Judge Robinson ruled on the same questions that are presented here. *United States v. 687.30 Acres of Land*, 319 F.Supp. 128 (D.Neb. 1970). This court agrees with his holding. Defendant Winnebago's counterclaim and amended counterclaim should be stricken. Rule 71A(e), FRCP. Plaintiff's motion to strike Winnebago's answer and amended answer should be denied. Rule 12(f), FRCP. Plaintiff's motion for summary judgment should be granted. Nothing in this order should be construed as foreclosing defendant's rights on the issue of just compensation.

It is therefore

ORDERED

1. Plaintiff's motion to strike is granted in part and denied in part in accordance with this order.

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FILED
MAR 11 1972
MICHAEL RODAK, JR., CLERK

No. 71-938

In the Supreme Court of the United States

OCTOBER TERM, 1971

WINNEBAGO TRIBE OF NEBRASKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

KENT FRIZZELL,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in this consolidated appeal (Pet. App. 24-29) is reported at 451 F. 2d 667. The opinion of the United States District Court for the District of Nebraska (Pet. App. 30-40) is reported at 319 F.Supp. 128, and that court's subsequent memorandum and order (Pet. App. 41-44) are unreported. The order of the United States District Court for the Northern District of Iowa (Pet. App. 45-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1971. The petition for a writ of certiorari was filed on January 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is a right of appeal from an order entered in a federal condemnation proceeding, prior to the valuation trial, denying the condemnee's challenge to the validity of the taking.

STATUTE INVOLVED

28 U.S.C. 1292 is set forth at Pet. App. 21-22.

STATEMENT

The government instituted separate condemnation proceedings, one in the district court in Nebraska, and related ones in the district court in Iowa, to obtain certain lands situated along the Missouri River in Nebraska and Iowa for a government-constructed recreational project known as the Oxbow Recreation Lakes, Snyder-Winnebago Complex. The Nebraska district court struck certain pleadings proferred by petitioner and granted the government's motion for summary judgment that it had authority to condemn the lands in question (319 F. Supp. 128; Pet. App. F). The Iowa district court followed those rulings (Pet. App. H). The cases were consolidated on appeal, and the court of appeals held that the district courts' orders were not appeal-

able and accordingly dismissed the appeals (Pet. App. E).

The facts are largely undisputed and are set forth fully in the opinions of the court of appeals and of the Nebraska district court. Petitioner, as one of several condemnees in the three separate proceedings here (one in Nebraska and two in Iowa), claimed ownership of some of the lands in issue as tribal land reserved to it by the Treaty with the Winnebago Indians of 1865, 14 Stat. 671. It contended that federal statutes authorizing and funding the recreational facility did not abrogate the 1865 Treaty, and that the United States consequently had no authority to take Winnebago lands by condemnation. (Pet. App. E, p. 25.)

In the Nebraska proceedings, the allegations concerning the government's authority to condemn petitioner's treaty lands, as well as a motion for preliminary injunction and for summary judgment, were made in supplemental pleadings filed after petitioner's answer to the complaint (*ibid.*). The Nebraska district court concluded that these matters were "in effect a supplemental answer and counterclaim," the filing of which was barred by the requirement of Rule 71A(e), Federal Rules of Civil Procedure, "that all objections or defenses to the taking must be asserted in the answer, [and] no other pleading or motion is allowed" (Pet. App. F, p. 34). It held that condemnation of the lands in question had been properly authorized (*id.* at pp. 37-40). The Iowa district court "agree[d] with" these rulings and hence struck a counterclaim and amended counterclaim and granted

summary judgment for the government upholding its authority to condemn petitioner's lands (Pet. App. H, pp. 46, 47).[1]

The Nebraska court refused to certify its decision for interlocutory appeal under 28 U.S.C. 1292(b) because "there is [no] substantial ground for a difference of opinion" on the government's authority and the possibility that petitioner will sustain irreparable harm from the project "is at best only slight" (Pet. App. G, pp. 42, 44). Certification was not sought in the Iowa proceedings.

The court of appeals dismissed the petitioner's appeals from these orders for want of jurisdiction. On the authority of *Catlin* v. *United States*, 324 U.S. 229, it concluded that the orders were not final judgments from which an appeal would be authorized under 28 U.S.C. 1291 since, in view of the fact that title and just compensation issues must still be decided, they did not "dispose of the litigation" (Pet. App. E, p. 27). The court held that it had "no jurisdiction to review" the Nebraska court's refusal to certify an interlocutory appeal under 28 U.S.C. 1292 (b), and that the orders striking proferred additional pleadings "are rulings on pleadings under Rule 71A (e) * * * [and therefore] are clearly interlocutory rulings and are not appealable" (*id.* at p. 28).

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[1] Petitioner did not seek a temporary injunction in the Iowa proceedings (Pet. App. E, p. 29).

ARGUMENT

The decision below dismissing petitioner's appeal is correct and presents no conflict of decisions or other question warranting review by this Court.

1. It is well established that pretrial decisions overruling objections to the condemnor's authority to take property are not appealable "final decisions" under 28 U.S.C. 1291. *Catlin* v. *United States*, 324 U.S. 229, 233, 236. This "general rule that condemnation orders prior to determination of just compensation are not appealable," *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69 n. 2, has never been overruled or qualified. The only time such an interlocutory decision may be appealed is when the district court, pursuant to 28 U.S.C. 1292(b), certifies that it "involves a controlling question of law as to which there is substantial ground for difference of opinion." The Nebraska court refused certification because those conditions were not satisfied in this case, and that refusal is not reviewable either by appeal, see *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 340 F. 2d 160 (C.A. 2), certiorari denied, 381 U.S. 924, or by extraordinary writ, see *Hirsch* v. *Bruchhausen*, 284 F. 2d 783, 784, 786 (C.A. 2).

A motion for a preliminary injunction, such as was filed here in the Nebraska case, does not support a different result in the present context. As the Nebraska district court pointed out (Pet. App. F, p. 34), the only response permitted in a condemnation proceeding under Rule 71A(e) is an answer; hence petitioner's motion was correctly stricken. An injunc-

tion is not an available means of testing the government's authority to condemn. Compare *Delaware Valley Conservation Association* v. *Resor*, 392 F. 2d 331, 333-335 (C.A. 3); certiorari denied, 393 U.S. 915; see also *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687, 704; *Malone* v. *Bowdoin*, 369 U.S. 643, 646-647. Thus, interlocutory appeal under 28 U.S.C. 1292(a), on which petitioner also relies (Pet. 8-11), is not applicable to the instant case.

2. Nor is there any real question concerning the government's authority to condemn the lands here in question. As this Court observed in *United States* v. *Reynolds*, 397 U.S. 14 n. 1, Section 4 of the Flood Control Act of 1944, 58 Stat. 889, as amended, 16 U.S.C. 460d, expresses a long-standing "Government policy to build recreational areas in conjunction with federal reservoir projects * * *." The project involved here comports fully with the broad authorization embodied in Section 4 of the 1944 Act. Indeed, the nature and location of the instant project, which was finally funded by the 1970 Public Works Appropriation Act (83 Stat. 323, 325), was explicitly considered during legislative deliberations in three sessions of Congress.[2] As the Nebraska district court concluded (Pet. App. F, pp. 37-40), the authorization is not any less suf-

[2] Hearings on Public Works Appropriations for 1970, House Subcommittee of the Committee on Appropriations, 91st Cong., 1st Sess. (1969), pt. 1, pp. 745-748; Hearings on Public Works Appropriations for 1969, House Subcommittee of the Committee on Appropriations, 90th Cong., 2d Sess. (1968), pt. 1, pp. 524, 526; Hearings on H.R. 11641, Senate Subcommittee of the Committee on Appropriations, 90th Cong., 1st Sess. (1967), pt. 1, pp. 1332-1333.

ficient because some of the lands to be used are tribal lands obtained by petitioner pursuant to treaty. Compare *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120-123, and cases there cited. See also *Seneca Nation of Indians* v. *United States*, 338 F. 2d 55 (C.A. 2), certiorari denied, 380 U.S. 952.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

ROBERT S. LYNCH,
DIRK D. SNELL,
Attorneys.

MARCH 1972.

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[3] The "Standing Rock" case, *United States* v. *2,005.32 Acres of Land, Etc.*, 160 F. Supp. 193 (D. S.D.), vacated and remanded with instructions to dismiss as moot, 259 F. 2d 271 (C.A. 8), on which petitioner relies (Pet. 12), is distinguishable. One of the statutes involved there required that the government acquire the necessary lands by contracts with the Standing Rock Sioux, and the contracts were expressly made subject to later ratification by Congress. The court emphasized that the contracts had not been negotiated before condemnation proceedings were started (160 F. Supp. at 200).

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